

INITIAL STATEMENT OF REASONS:

The California Prison Industry Authority (CALPIA) and the California Prison Industry Board (PIB) propose to adopt new Section 8106.2 of Article 6, of the California Code of Regulations (CCR), Title 15, Division 8, concerning sensitive position designations for the purpose of employee substance abuse testing.

Executive Order D-58-86 (dated September 24, 1986), incorporated by reference, directs all State agencies to assist the Department of Personnel Administration¹ with creating guidelines for designating employees in “sensitive” positions for the purpose of employee substance abuse testing.

PC section 2808 provides the PIB with the authority to approve CALPIA’s rulemaking proposals concerning sensitive position designations of CALPIA personnel. California Legislature explicitly imparted the function of the PIB in PC section 2808 and provided the PIB with “*all powers to do all of the things that the board of directors of a private corporation would do . . .*”

In PC section 2809, the California Legislature explicitly imparted CALPIA to establish practices which will meet the unique personnel needs of the authority. PC section 2809 provides CALPIA and the PIB with the authority to establish practices to designate sensitive positions for the purpose of employee substance abuse testing.

Title 2 of the CCR, Subsection 599.960(a) specifically states CalHR’s regulations for employee substance abuse testing *shall not be construed as a required prerequisite to or setting standards for any other types of provisions available under law to serve this purpose*. Subsection 599.960(a) allows for other provisions of law to be implemented to achieve a drug-free State work place.

¹ Currently referred to as California Department of Human Resources

Pursuant to Government Code section 11342.2, this proposed regulation is consistent and not in conflict with Executive Order D-58-86, Title 2 of the CCR, Subsection 599.960(a), and PC sections 2808 and 2809; this proposed regulation is reasonably necessary to effectuate the purpose of Executive Order D-58-86, Title 2 of the CCR, Section 599.960(a), and PC sections 2808 and 2809.

In order to implement and make specific, Executive Order D-58-86, Title 2 of the CCR, Subsection 599.960(a), and PC sections 2808 and 2809, CALPIA and the PIB propose to adopt new regulations concerning sensitive position designations for the purpose of employee substance abuse testing.

In order for CALPIA to function safely and efficiently, new regulations are needed to speed up the process for designating sensitive positions for the purpose of employee substance abuse testing. Current regulations² direct state agencies to seek California Department of Human Resources' (CalHR) approval for the designation of sensitive positions. CalHR's regulated process for designating sensitive positions is slow, nonproductive, and causing a threat to the safety of CALPIA employees and other individuals inside the workplace. CalHR stalled CALPIA's ability to test employees for substance abuse under reasonable suspicious circumstances for more than two years. CALPIA needs its own regulatory provisions to quickly identify and designate current and future job assignments that are sensitive for safety reasons.

The proposed amendments will be vetted through the public process of the PIB, as required in PC 2808(h) and (i), and promulgated through the regulatory process as specified in the APA. CALPIA will give notice to employees affected by the proposed regulation and give such employees the opportunity to submit comments their comments or alternative suggestions.

The PIB will vote on these proposed regulations at the Board Meeting on DEC 15, 2016. Upon approval, the PIB's Record of Vote and the applicable minutes will be placed in

² Title 2, Division 1, Chapter 3, Subchapter 1, Article 29, section 599.961 of the CCR

this final rulemaking file. All rulemaking documents will be filed with the Office of Administrative Law (OAL) and are all available to the public on CALPIA's website.

Consideration of Alternatives:

CALPIA must determine that no reasonable alternatives considered, or that has otherwise been identified and brought to the attention of CALPIA, would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

CALPIA has made an initial determination that no reasonable alternatives to the regulation have been identified or brought to the attention of CALPIA that would lessen any adverse impact on small business.

Currently, no reasonable alternatives have been brought to the attention of CALPIA that would alter CALPIA's initial determination.

ECONOMIC IMPACT ASSESSMENT

In accordance with Government Code Section 11346.3(b), CALPIA has made the following assessments regarding the proposed regulations:

Significant Statewide Adverse Economic Impact on Business:

The CALPIA has initially determined that the proposed amendments will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of CALPIA employees.

Creation or Elimination of Jobs within the State of California

CALPIA has determined that increasing the list of substances that CALPIA employees can be tested for will have no impact on the creation or elimination of existing jobs or

businesses within California because those jobs or businesses are not affected by the internal management of CALPIA employees.

Creation of New Businesses or Elimination of Existing Businesses within the State of California

Increasing the list of substances that CALPIA employees can be tested for will have no effect on the creation of new or elimination of existing businesses with the State of California because those businesses are not affected by the internal management of CALPIA employees.

Expansion of Business Currently Doing Businesses within the State of California

Increasing the list of substances that CALPIA employees can be tested for will have no effect on the expansion of businesses currently doing business within the State of California because they are not affected by the internal management of CALPIA employees.

Benefits of the Regulations

The proposed regulatory action will benefit CALPIA by providing a quicker process for CALPIA positions to be designated as sensitive for the purpose of substance abuse testing. These proposed regulations will help to ensure that CALPIA operations are performed without undue risk of costly personal injuries and/or property damage. The changes will not impact the state's environment.

Reports Relied Upon

The CALPIA, in proposing these regulations, has not identified nor relied upon any technical, theoretical, or empirical study, report, or similar document.

Specific Purpose and Rationale, Per Government Code 11346.2(b)(1)

Subsection 8106.1(a) is amended to delete text that indicates section 599.961³ applies to CALPIA. Section 599.961 grants CalHR the final authority to approve sensitive position designations. Eliminating CalHR's role in designating CALPIA sensitive positions is necessary as described under the heading New Subsection 8106.2(a). This rule making package will grant authority to the General Manager to designate CALPIA job assignments that are sensitive for the purpose of substance abuse testing.

A minor grammatical change was made to add the letter 's' to the word 'section' in the seventh sentence of subsection 8106.1(a).

For clarity reasons, text was added to clarify a specific CalHR rule (Title 2 CCR section 599.961) that no longer applies to CALPIA. Because subsection 8106.1(a) is specifically written to indicate which CalHR rules apply, and do not apply, to CALPIA employees, it is necessary to make this clarification to eliminate any confusion or future misinterpretations. CALPIA will rely on its own regulatory language (Title 2 CCR section 8106.2) to determine sensitive positions.

Subsection 8106.1(b) is amended to add text which directs the reader to new subsection 8106.2(b) when determining if an employee meets criteria for substance abuse testing. Because CALPIA is following regulations in Title 2 and Title 15 in the CCR, clarification is necessary to ensure which regulations do, and do not, apply to CALPIA. Current regulations authorize CalHR to approve CALPIA's sensitive position designations (see subsection 8106.1(a)). This rulemaking file is proposed to eliminate CalHR's role in the process and allow the General Manager to designate sensitive positions in new subsection 8106.2(b). Directing the reader to this new subsection will create efficiency and clarity. Without this amended text, confusion or misinterpretations may occur when determining the authority for sensitive position designations.

³ 2 CCR § 599.961

(b) Filled positions shall be identified as sensitive through the following process:

(1) Subject to Department approval, each appointing power shall identify the positions under his/her jurisdiction that meet the standards in subsection (a).

(2) The employees serving in the identified positions and, where applicable, their union representatives, shall receive an initial notice that the position has been identified as sensitive and shall be given 30 days to respond.

(3) After considering responses to the initial notice and meeting with employee representatives as required by the Ralph C. Dills Act (Government Code sections 3512 through 3524), the Department shall issue a final notice to the employees serving in the positions that have been identified as sensitive. This notice shall include a description of the provisions of this article. Existing practices in this area shall not change for any position until 60 days after the final notice concerning it is issued.

New Subsection 8106.2(a) is proposed to define the process for determining sensitive positions for CALPIA employees. Current regulations authorize CalHR to approve CALPIA's sensitive position designations (see subsection 8106.1(a)); this rulemaking file is proposed to eliminate CalHR's role in the process and allow the General Manager to designate sensitive positions in new subsection 8106.2(b). Affirming that 8106.2 is CALPIA sensitive position designation process will create clarity. Without this amended text, confusion or misinterpretations may occur when trying to determine the authority for sensitive position designations for CALPIA employees.

New Subsection 8106.2(b) is proposed to ensure an employee can be drug tested only under the specific circumstances of reasonable suspicion. CALPIA's current regulations (see subsection 8106.1(a)) rely on CalHR regulations to define reasonable suspicion. Because CALPIA is following regulations in Title 2 and Title 15 in the CCR for the purpose of drug testing, clarification is necessary to ensure which regulations apply to CALPIA.

New Subsection 8106.2(c) is proposed to allow CALPIA's General Manager to assess CALPIA positions and decide which positions should be determined sensitive based on criteria described in subsections 8106.2(c)(1)-(c)(3). In order for CALPIA to function safely and efficiently, CALPIA's General Manager needs authority to speed up the process for designating CALPIA sensitive positions. Current regulations authorize CalHR to approve CALPIA's sensitive position designations which has been proven to be a slow, nonproductive process which creates a threat to the safety of CALPIA employees and other individuals inside the workplace. CALPIA needs its own authority to quickly identify and designate current and future job assignments that are sensitive for safety reasons.

New Subsections 8106.2(c)(1)-(3) are proposed to place specific criteria that must be applied when the General Manager is assessing and determining sensitive position designations. The criteria is developed to measure job duties that require a higher than normal level of trust and responsibility due to the potential risks and hazards in the workplace.

Also, when determining sensitive positions, the General Manager must recognize the types of job duties that are performed independently where irreversible mistakes cannot be immediately prevented by a supervisor or another employee. Examples of these circumstances include, but are not limited to, employees driving heavy trucks on public highways, handling biological hazards in a health facility, or supervising the lockout-tagout⁴ procedures for machine repairs. These types of job duties have the potential for an accident to occur within seconds without the possibility of another person intervening to prevent it. Most CALPIA job duties and working environments involve potential dangers that accidental, neglectful, or impaired decision making could create major impacts, within seconds, to the health and safety of others.

⁴ Lockout-tagout or lock and tag is a safety procedure which is used in industry and research settings to ensure that dangerous machines are properly shut off and not able to be started up again prior to the completion of maintenance or servicing work.

CALPIA employees working in these environments are also responsible for training, mentoring and supervising inmates to safely operate the machinery and equipment. Proper training of procedures for operating, cleaning, repairing, servicing and adjusting equipment and machinery is vital for safety reasons; thorough training must be conducted without error and with full attention to every detail.

Examples of potentially hazardous CALPIA work environments include, but are not limited to:

- factories with heavy, industrial equipment that contain dangerous moving parts such as belts and pulleys, gears and sprockets, and conveyor nip points
- custodial work inside prison healthcare facilities involving blood borne pathogen and other biological hazard clean up and sharp, medical instrument disposal
- use of metal power press machines that use 120-150 tons of pressure
- use of elevated platforms, including scissor lifts, boom lifts, and scaffolds
- trenching and excavation work
- use of table saws, tree shredder, chainsaws, and powered tools
- use of pressure vessels such as boilers, tanks, and air compressors
- heavy truck driving on public roads/highways
- forklift, agricultural equipment, yard truck, and tractor operators
- fire and explosion dangers & electrical hazards
- transporting and exposure to hazardous chemicals

These CALPIA job duties and work environments are the types of criteria the General Manager must consider when assessing and determining sensitive position designations for the purpose of drug testing. If an employee's error in judgment, inattentiveness, diminished coordination or composure (caused by substance abuse) could have severe harmful effects to their self or others, the General Manager will designate their position as sensitive.

New Subsections 8106.2(d)(1) is proposed to give proper notice to an employee when his or her position has been assessed and will soon become designated as sensitive. The purpose of giving notice will provide an option for the employee to respond with comments, suggested alternatives, or questions. Because CalHR's current, regulated practice is to give employees 30 days for notice, CALPIA will maintain the same amount of time. The employee will have 30 days to determine if they want to continue working in a position that will soon be designated as sensitive and subject to drug testing. Any feedback provided by the employee, based on their comments, suggestions, or questions, may also help the employee to determine whether or not to continue working in their current positions.

New Subsections 8106.2(d)(2) is proposed to give employees an additional 60 day notice, after the initial 30 day notice described in subsection 8106.2(d)(1) has concluded. Because CalHR's current, regulated practice is to give employees 60 days for final notice, CALPIA will maintain the same amount of time for the final notice to employees indicating their position will be designated as sensitive. The notice will include all policies and regulations that will affect the designated employee in the event of a substance abuse testing. CALPIA will not change its existing practices for the employee's position until 60 days after the final notice is issued and their position is publicly designated sensitive pursuant to new subsection 8106.2(g). The purpose of giving notice to the employee will provide 60 days for the employee to determine if they want to continue working in a position that will soon be designated as sensitive and subject to drug testing.

New Subsections 8106.2(e) is proposed to allow the designation of vacant positions as sensitive for the purposes of reasonable suspicion drug testing. It is necessary to designate vacant positions, especially when they are newly created positions. It would not be effective to only have designation capabilities when a position is occupied. The job duties of a vacant position are enough to determine if the position should be designated as sensitive; this subsection is necessary to ensure the designation can be done quickly and without requiring the position to be occupied.

New Subsections 8106.2(f) is proposed to provide clarity to all job applicants that are interested in applying for a position at CALPIA that is designated as sensitive and subject to drug testing. This subsection is necessary to require drug testing provisions to be included in job announcements to ensure the applicant can make an informed decision on whether to apply for a CALPIA sensitive position that is subject to drug testing.

New Subsections 8106.2(g) is proposed to create a publicly shared source for any person to view at any time via the internet; CALPIA will display all current designated sensitive positions on its website for convenience and transparency. Because some CALPIA employees are subject to reasonable suspicion drug testing while other CALPIA employees are not subject, it is important to have a readily available list of sensitive positions to view at any time via the internet. This will offer clarity while also providing quick answers to anyone who needs to access the form.